



GENERAL STATUTES COMMISSION

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MEMORANDUM

To: General Statutes Commission
From: David Unwin, Staff Attorney
Re: Bill Draft 2017-MUZ-43 (Real Prop. Partition/Carrying Costs)
Date: March 1, 2018

General Comments

Bill Draft 2017-MUZ-43 (Real Prop. Partition/Carrying Costs) provides that in a real property partition proceeding, a cotenant has a right to contribution for the cotenant's payment of carrying costs and for the value added to the real property by the cotenant's improvements. The draft provides that this right is subject to an offset in the amount of the fair market rental value of the cotenant's occupation of the real property.

Background

A. Carrying Costs

Under caselaw, in a real property partition proceeding, a cotenant generally has a right to contribution for the cotenant's payment of carrying costs. *Harris v. Gilchrist*, ___ N.C. App. ___, ___, 785 S.E.2d 119, 125 (holding that cotenants had a right to contribution for payment of property taxes and homeowner's insurance), *disc. review denied*, 369 N.C. 68, 793 S.E.2d 223 (2016); *Knotts v. Hall*, 85 N.C. App. 463, 465-66, 355 S.E.2d 237, 239 (holding that a cotenant had a right to contribution for payment of property taxes), *aff'd per curiam*, 321 N.C. 119, 361 S.E.2d 591 (1987). G.S. 105-363(b) similarly provides that generally if a cotenant pays the entire amount of a tax lien on the real property, the cotenant receives a lien against the other cotenants' interests in the real property.

A cotenant, however, who has exercised exclusive possession of the real property does not have a right to contribution for the carrying costs. *Harris*, ___ N.C. App. at ___, 785 S.E.2d at 125; *Knotts*, 85 N.C. App. at 466, 355 S.E.2d at 239; *cf. Craver v. Craver*, 41 N.C. App. 606, 607, 255 S.E.2d 253, 254 (1979) (holding that outside a partition proceeding, a cotenant who had exclusive possession did not have a right to contribution for repairs). In *Harris* and *Knotts*, the North Carolina Court of Appeals held that "there was 'no basis for a finding of exclusive possession' where the occupying co-tenant made no attempt to withhold the property from the other co-tenants and where the other co-tenants made no demand to possess the property." *Harris*, ___ N.C. App. at ___, 785 S.E.2d at 125 (quoting *Knotts*, 85 N.C. App. at 467, 355 S.E.2d at 240).

B. Improvements

Under caselaw, in a real property partition proceeding, a cotenant generally also has a right to contribution for the value added to the real property by the cotenant's improvements. *Harris*, ___ N.C. App. at ___, 785 S.E.2d at 122-23 (discussing *Pope v. Whitehead*, 68 N.C. 191 (1873) (*per curiam*)). The amount of the contribution is "based not on the actual cost in making the improvements, but on the enhanced value they give the [real property]." *Id.* at ___, 785 S.E.2d at 123 (citation, quotation marks, brackets, and emphasis omitted).

Similarly, if the real property is partitioned in kind, a cotenant who has made improvements to the real property may receive the improved share and the value of the improved share may be calculated as if no improvements had been made to it. *Jenkins v. Strickland*, 214 N.C. 441, 444, 199 S.E. 612, 614 (1938).

C. Rent

Under caselaw, each cotenant has a right to possess the entire real property. *Knotts*, 85 N.C. App. at 466, 355 S.E.2d at 239. Although a cotenant must share with the other cotenants rental payments received from third parties, a cotenant is liable for the cotenant's occupation of the real property only if the cotenant has committed an actual ouster. *Harris*, ___ N.C. App. at ___, 785 S.E.2d at 124. An actual ouster is "a cotenant's clear positive denial of another cotenant's rights in the common property." *Id.* at ___, 785 S.E.2d at 124 (citation, quotation marks, and brackets omitted).

D. Other Issues

Under caselaw, outside a real property partition proceeding, a cotenant has a right to contribution for property taxes paid during the past 10 years. In *Martin Marietta Materials, Inc. v. Bondhu, LLC*, a plaintiff-cotenant sought contribution from a defendant-cotenant for the plaintiff-cotenant's payment of property taxes. *Martin Marietta Materials, Inc. v. Bondhu, LLC*, 241 N.C. App. 81, 82, 772 S.E.2d 143, 144-45 (2015). The defendant-cotenant raised the statute of limitations defense. *Id.*, 772 S.E.2d at 145. The Court of Appeals held that it was unclear whether the plaintiff-cotenant's claim arose from an implied contract or was a claim for an accounting in equity.¹ *Id.* at 86-87, 772 S.E.2d at 147. The Court followed the North Carolina Supreme Court's holding that "where there is doubt as to which of two possible statutes of limitation applies, the rule is that the longer statute is to be selected." *Id.* at 87, 772 S.E.2d at 147 (quotation marks omitted) (quoting *Fowler v. Valencourt*, 334 N.C. 345, 350, 435 S.E.2d 530, 533 (1993)). The Court thus chose the 10-year statute of limitations under G.S. 1-56 that corresponded to the equitable accounting claim because that statute provides a longer period. *Id.*, 772 S.E.2d at 148.

Specific Comments

Section 1 of the bill draft adds a new § 46-3.2 to Article 1 of Chapter 46 of the General Statutes:

Subsection (a) of § 46-3.2 provides that in a real property partition proceeding, a cotenant has a right to contribution for the cotenant's payment of carrying costs and for the value added to the real property by the cotenant's improvements. This right is subject to an offset in the amount of the fair market rental value of the cotenant's occupation of the real property. Subsection (a) alters the rights of cotenants under caselaw and simplifies the cotenants' rights by removing the concepts of exclusive possession and actual ouster.

Subsection (b) of § 46-3.2 provides that at any time during a real property partition proceeding, a cotenant may assert on application the right to contribution provided in subsection (a) of § 46-3.2. Another cotenant may respond to the cotenant's application by asserting the offset provided in subsection (a) of § 46-3.2.

¹ Although the plaintiff-cotenant's substantive claims arose under Virginia law since the real property was located in Virginia, this case is still instructive because North Carolina law also includes the concepts of implied contract and equitable accounting. *Id.* at 83, 86, 772 S.E.2d at 145, 147.

Subdivision (c) of § 46-3.2 defines carrying costs as the actual costs of preserving the value of and the cotenants' interests in the real property, including payments for a loan to acquire the real property, homeowner's insurance, repairs, and property taxes.

Subdivision (d) of § 46-3.2 provides that a cotenant's right to contribution for property taxes under subsection (a) of § 46-3.2 is limited to the amount of property taxes paid by the cotenant during the past 10 years, plus interest at the legal rate under G.S. 24-1 (which is currently 8% per year).

Subsection (e) of § 46-3.2 provides that § 46-3.2 does not affect cotenants' rights outside a real property partition proceeding.

Section 2 provides that the bill becomes effective October 1, 2018, and applies to real property partition proceedings commenced on or after that date.